

No. 21105

In the
United States Court of Appeals
For the Ninth Circuit

RPTZ-PATCO, INC.,
Appellant and Cross-Appellee,

v

PACIFIC INLAND NAVIGATION COMPANY, INC.
Appellee and Cross-Appellant.

REPLY TO ANSWERING BRIEF
ON CROSS-APPEAL

Appeal from the United States District Court
for the District of Oregon

HON. JOHN F. KILKENNY, Judge

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IN GENERAL

The subject of the cross-appeal is covered on pages 41 through 63 of Pacific's Brief and this Reply will be limited to answering PATCO's Answering Brief on the cross-appeal with respect to the question of infringement.

Pacific agrees with the statement of the issues raised by this cross-appeal as set forth on page 24 of the Answering Brief of PATCO.

PACIFIC'S INFRINGEMENT ARGUMENT

Starting at page 24 of the Answering Brief, PATCO discusses Pacific's argument with respect to non-

infringement and attempts to categorize the four claims in suit; namely claims 1, 6, 8 and 11, into two categories to the effect that claims 6 and 8 make no reference to access to the cofferdam, while claims 1 and 11 include access provisions therefor. However, it is urged that such categorization cannot properly be made.

An inspection of the claims in issue of the patent in suit (DX 1) reveals as follows:

Claim 1 is limited to a V-shaped single, continuous cofferdam construction extending from the deck line of the hull and meeting at the bottom, with means at the deck line of the hull providing for entry into the cofferdam structure.

Claim 6 is likewise limited to a single continuous V-shaped cofferdam structure joined at the bottom of the hull and includes a grain collection pit which is also cofferdammed.

Claim 8 is limited also to a single V-shaped cofferdam structure extending downwardly and inwardly to the deck line of the hull and also includes a cofferdammed pit, but differs from claim 6 in that it also includes vertical cofferdams adjacent the ends of the V-shaped cofferdam.

Claim 11 is like claim 1 in that it does not include either the cofferdammed collection pit or the vertical

cofferdams, but is limited to a single V-shaped continuous cofferdam construction with access means to the cofferdam from an area above the deck to permit inspection thereof.

It is elementary that claims of a patent must be read in the light of the specification, drawings, proceedings in the Patent Office, including the contents of cancelled claims, positions taken in the trial on behalf of the patentee, as well as the prior art. When these rules are applied, there is no doubt that all of the claims must be read as being limited to a single, continuous V-shaped cofferdam in which the following four characteristics are present, *none of which is present in the accused construction*. The four characteristics are as follows:

1. Access must be provided to the entire V-shaped cofferdam structure from either side thereof.
2. Visual inspection must be possible from either side of the V-shaped cofferdam structure, including the bottom thereof.
3. It must be possible to gas-free the entire V-shaped cofferdam structure from one side thereof.
4. It must be possible to visually inspect the interior of the void surrounding the grain collection pit from points within the main cofferdam structure.

First, referring to the specification of the patent in

suit (DX-1), the Court's attention is directed to the following excerpts:

"* * * The cofferdam structure has side portions 48,50 along each side of the hull, which slope downwardly and inwardly from a side and which join at the longitudinal centerline of the hull." (Column 2, lines 61-67).

"* * * The void between wall structure 140 and the inner walls of pit 130 connects with the voids of the portions of the V-shaped cofferdam directly adjacent thereto, which feature enables visual inspection of the interior of the void surrounding the pit from points within the cofferdam." (Column 4, lines 70-75).

"Each compartment of the liquid cargo space and each compartment of the cofferdam is accessible for repair purposes from points located on both sides of the hull and outwardly of the edges of the dry cargo space, and at the deck line defined by deck 108." (Column 5, lines 1-5).

"From the above description it will be seen that there is accessibility to all portions of the liquid cargo space, and to the entire interior of the cofferdam, and the accessibility is there regardless of whether dry cargo is present in the dry cargo space. Further, this accessibility is realized using a relatively simple, rigid construction." (Column 5, lines 50-55).

"The V-shaped cofferdam structure has peculiar advantages. Accessibility is provided to all parts of the liquid cargo space and to all compartments of the cofferdam, and this is from both sides of the vessel and from locations spaced outwardly of the dry cargo bin space." (Column 6, lines 61-65).

The specification of the patent in suit stresses all of the characteristics set forth above not present in the accused structures, except the feature of gas-freeing from one side of the cofferdam structure. However, this feature was stressed at the trial by the inventor Pickrell (R.T. 61-62):

“Q Reference is made in the patent to access to the cofferdam. Could you tell the Court where that is and what its purpose is?

“A Well, it is approximately there (indicating) in the deckline, and the purpose of this is to get access. Anyone working around petroleum, obviously, you want all the safety factors you can possibly install in a barge. We have two manholes, one on each side, for easy admittance, and also to put a venter on one side and open the other side so we get direct, clean ventilation under pressure to remove all the gas fumes, because if you don't, the gas fumes lay heavy in the bottom of the barge and it is almost impossible to remove these fumes in those dead spaces without having a thorough ventilation system.

“Q When you speak of gases, Mr. Pickrell, are you speaking in any sense from personal experience?

“A Yes, sir. We have had a barge on fire, and if a person is caught in a dead space like that and the barge is aflame, you don't know just what you might do. It is nice to have these openings, sufficient openings, for a safety factor to get out.”

Actually, Pickrell included a fifth characteristic not found in the accused structures; namely, a safety factor

for a person who might be caught in the cofferdam if there is a fire.

From the foregoing, it is urged that when the claims are read in the light of the specification and also in the light of the inventor's testimony as to the reasons for the particular construction disclosed in the patent in suit, the accused barges do not infringe. This is further fortified by reference to FIG. 3 of the drawing of the patent in suit which shows a continuous V-shaped cofferdam structure having all of the characteristics referred to, it being noted that no alternate construction is disclosed and that no mention is made either that an alternate construction could be used or that the disclosed construction is not required.

With respect to the proceedings in the Patent Office and prior art, these are covered in the Brief on Cross-Appeal. However, at pages 46-47 of the Brief on Cross-Appeal, it is stated that original claim 1 read as quoted on those pages.

Actually original claim 1 read somewhat differently. That claim as amended, never allowed and subsequently cancelled did read as quoted at pages 46-47 of the Brief on Cross-Appeal. So that there will be no confusion, claim 1 as originally presented is reproduced below, and the amendments made to it in the first amendment are shown as they appear in the certified

copy of the file wrapper of the patent in suit the deleted portions and the strike in constituting the amendment.

With the amendments, the claim reads as quoted on pages 46-47 of the Brief on Cross-Appeal:

“1. A cargo vessel comprising a hull having sides and a bottom, and means within the interior of the hull defining an elongated cargo space for dry cargo, the latter means comprising a cofferdam structure having opposed side portions, one on each side of the hull, each side portion extending downwardly into the hull and sloping inwardly from the side of the hull, said cofferdam structure having a continuous top surfacing defining the bottom of the cargo space for a dry cargo and a continuous bottom surfacing which, together with the bottom and sides of the hull, defines a second cargo space adapted to carry liquid cargo, said top and bottom surfacing being separated by a void.” (DX 29, page 16).

It is noted that original claim 1 and that claim as amended by the first Office Action has no reference to access or entry to the cofferdam for inspection thereof throughout its entirety including the bottom. However, as pointed out in the Brief on Cross-Appeal, not only the specification and the drawings of the patent in suit limit the claims, but the statements concerning access, V-shaped (as distinguished from the W-shape of the access parts), visibility for inspection and the like were made with respect to a claim which had none of these features

recited therein. *Therefore, the same arguments must apply to the claims of the patent in suit whether they specifically spell out these features or not.* It follows, therefore, that it is improper to attempt to categorize the four claims of the patent in suit in order to provide a basis for them being infringed as such categorization has been attempted.

The law of the Ninth Circuit and the United States Supreme Court is well settled with respect to the construction of patent claims.

The leading Supreme Court case is *Schriber-Schroth Co. v. Cleveland Trust Co.*, (1940) 311 U.S. 211, 61 S.Ct. 235, 85 L.Ed. 132.

Where the claim uses broader language than the specification, reference may be had to the latter for the purpose of *limiting* the claim. See *McClain v. Ortmyer*, 141 U.S. 419, 12 S.Ct. 76, 35 L.Ed. 800; *Magnavox Co. v. Hart & Reno*, (C.C.A. 9 1934) 73 F.2d 433, and *Lanyon v. M. H. Detrick Co.*, (C.C.A. 9 1936) 85 F.2d 875.

A recent case on this point in the Ninth Circuit is *Oregon Saw Chain Corp. v. McCulloch Motors Corp.*, (C.A. 9 1963) 323 F.2d 758. This case and the cases cited therein point out not only that the claims of a patent must be understood and interpreted in the light of its specifications, but that the specifications can be used only to limit claims and not to expand them; further-

more, that if a patentee describes and claims only a part of his invention, he is presumed to have abandoned the residue to the public. This case has been cited in Pacific's main Brief on the doctrine of file wrapper estoppel.

The Court's attention is also directed to the case of *Nelson v. Batson*, (C.A. 9 1963) 322 F.2d 132. That case stands for the proposition that there is no legally recognized or protected "essential" element, "gist" or "heart" of the invention in a combination patent. PATCO apparently is attempting to take the position that Pacific has appropriated the "heart" of the alleged Pickrell invention, but since the Pickrell patent is a combination patent in a narrow field, this contention is untenable in view of the law of this Circuit, as well as the law of the Supreme Court.

PATCO'S ARGUMENT WITH RESPECT TO THE CONTINUOUS CHARACTER OF THE COFFERDAM STRUCTURE IN THE ACCUSED BARGES

PATCO argues that Pacific's argument as to non-infringement places a totally unrealistic interpretation on the word "continuous". The statement is made on page 26 of the Answering Brief, as follows:

"Mr. Pickrell, the patentee, did not intend that the V-shaped cofferdam of his invention must be one continuous cofferdam structure without interruption

of any kind, but rather that the V-shaped device in the environment described should function as and for a cofferdam.”

This is an entirely new theory of PATCO and is completely untenable. As pointed out, no alternative construction except the single continuous cofferdam V-shaped construction is mentioned or suggested in the Pickrell patent, nor is there any statement by Pickrell that the single continuous construction is not essential to his alleged invention. *Oregon Saw Chain*, supra, at page 766, reads as follows, and is controlling:

“We think the language of the Supreme Court in *Snow v. Lake Shore & Michigan Southern Railway Co.*, 1887, 121 U.S. 617, 630, 7 S.Ct. 1343, 30 L.Ed. 1004, is pertinent here. It reads:

‘It is not admissible to adopt the arguments made on behalf of the appellants, that this language is to be taken as a mere recommendation (or “preferred form” or “best mode contemplated”) by the patentee of the manner in which he prefers to arrange these parts of his machine. There is nothing in the context to indicate that the patentee contemplated any alternative for the arrangement * * *,

nor did he describe such arrangement as not essential. Cf. *Fulton Co. v. Powers Regulator Co.*, 2 Cir. 1920, 263 F. 578; *McRoskey v. Braun Mattress Co.*, supra.”

The Court in *Oregon Saw Chain* held the claims not infringed. Our arguments with respect to the effect of file wrapper estoppel are contained in the Brief of Pacific.

At page 27 of the Answering Brief, reference is made to the testimony of Pacific's witnesses, Spaulding, Newitt and Glosten. There is no admission by any of these witnesses that the multiple W-shaped cofferdam construction of the accused barges is the equivalent of the single continuous V-shaped cofferdam construction of the Pickrell patent. Even the quoted portion of Mr. Spaulding's testimony at R.T. 392-393 points out that there are a series of cofferdams in the accused barges. Mr. Spaulding testified at R.T. 393 that four cofferdams are present and are divided by a single plate diaphragm. At R.T. 357-61, Mr. Spaulding testified as to the functional differences with the separate cofferdams of the accused structure and that each space is provided with its own access and its own venting, that the four cofferdams are completely independent of each other and that in the accused barges it is impossible to see all of the surfaces, including the bottom of the cofferdam with one entry; also, that access to the center line cofferdam will be from either end compartment of Ex 9-B.

One of the most important differences and advantages of the accused construction was pointed out by Mr. Spaulding at R.T. 361:

“Q From the standpoint of structural rigidity, referring again to Defendant’s Exhibit 75, which of the two constructions would be preferable?

“A In my opinion, the Pacific Inland barge would be preferable because of the greater depth of hull structure under the grain sump or the recess for the augers.”

At this point, Mr. Spaulding had been asked to compare the structure of the patent and the accused Pacific Inland barge.

See also the testimony of Newitt, Pacific’s patent expert at R.T. 448, lines 8-22.

On page 28 of the Answering Brief, a discussion of the word “continuous” is found and the case of *Nachman Springfilled Corp. v. Spring Products Corp.*, (C.C.A. 2 1934) 68 F.2d 829 is cited. This case, as well as the other cases referred to in the Answering Brief on pages 29 and 30, are not in point with respect to non-infringement of the accused barges. In effect, when the constructions of the patents involved in the cited cases are analyzed, it is apparent that all that was done in an attempt to avoid infringement was to make one piece of material which was “continuous” in the patent in suit into two pieces of material joined together but positioned in and performing the same function as the single piece of material of the patents.

In the present case, while three or possibly four separate cofferdam constructions are contiguous, they are separated by plates which form four void spaces instead of one and they have additional functions structurally over and above being merely cofferdams. This is not a case where there is merely a colorable attempt to avoid the claims of an issued patent. The patent in suit had not even issued prior to the time the accused barges were concluded and in service. Furthermore, the constructions of the accused barges provide different functions than the disclosure of the Pickrell patent and whether superior or inferior, nevertheless, are different for specific reasons.

Reference is made to the testimony of Pacific's practical expert, Spaulding, a well qualified naval expert and naval architect, at R.T. 356-357, wherein he states:

"Q Now, will you describe from a naval architect's standpoint the construction of the cofferdam structures of this barge, referring specifically to—well, you can refer to any part of the drawing you wish.

"A * * * The two augers are separated by a cofferdam, and this appears to be—there appears to be sufficient depth of hull under the augers to provide proper transverse strength, and there is adequate access to the cofferdam spaces.

"I note by the drawing that, rather than having one continuous cofferdam as is noted by the patent claim, that in transverse section the cofferdam is separated into three distinct spaces, each space hav-

ing been provided with its own access and its own venting.”

It is, therefore, abundantly clear that the cofferdam structure of the accused barges are not “continuous” in any sense of the word and that the lack of continuity provides actual structural differences performing different functions rather than connecting two pieces of material together instead of having one piece which is the thrust of the decision decided by opponent.

As has been pointed out before, the claims in issue of the Pickrell patent are all limited to “V-shape.” PATCO takes the position that to call the cofferdam structure a “W-shaped” cofferdam borders on the ridiculous (Answering Brief, page 31). This is a ridiculous statement, since it is obvious that Pacific’s cofferdams result in a W-shape. Mr. Glosten testified at R.T. 272-273 that within his own office during the designing process, the cofferdam was referred to as “a W-shaped space, and I have always thought of it that way.” The case referred to in the Answering Brief quotes the case of *Myers v. Beall Pipe and Tank Corporation*, (D.C. Ore. 1948) 90 F. Supp. 265, 79 USPQ 173, as follows:

“In attempting to avoid the claims of infringement, it is also argued that the form of the structure does not fall within the claims of the Myers patent.

It is fairly obvious that a great deal of effort has been gone to in order to change the form so that it would look different than the Myers patent, but imitation of essentials is the truest flattery and also points to the reality of infringement. Any equivalent of a reach with proper devices for attachment so that traction is transmitted to the frame and to the ground engaging elements, is sufficient to satisfy a finding of infringement. The attempt to differentiate the accused construction from those of the patent, because the means of attaching and supporting the reach are not identical, is made by subtly fallacious reasoning.” (90 F. Supp. at 272)

The present case clearly distinguishes from *Myers*, since as has been pointed out, the Pickrell patent had not issued when the accused barges were designed, constructed and placed into service, so obviously there could not have been a great deal of effort to change the form of the barges so that they would look different from the *Myers* patent. *Myers* also involves the doctrine of equivalents, since there was no file wrapper estoppel, which is not the situation here.

It has already been pointed out that the W-shaped cofferdam is materially different in utilization, characterization and function.

PATCO'S ARGUMENT RE FILE WRAPPER ESTOPPEL

The Brief on Cross-Appeal sets forth Pacific's position on file wrapper estoppel in detail. However, answering PATCO's arguments on pages 33-38 of the An-

swering Brief, it states on page 34 thereof as follows:

“* * * let it be clearly understood that Cross-Appellee has not sued on cancelled claims 1 and 2.”

Such a statement begs the question of file wrapper estoppel, since the law with respect thereto is in part based upon the wording of claims which have been cancelled during the prosecution of the patent application which results in the issuance of a patent.

PATCO, however, is finally completely candid in its basis for alleging that the accused barges infringe claims 1, 6, 8 and 11 of the patent, when it states in the Answering Brief at page 34 that:

“* * * It has, however, brought suit on Claims 1, 6, 8 and 11 of the patent and fully demonstrated that these claims are infringed by the accused barges *since they embrace the spirit and substance of the Pickrell invention* as defined therein.” (emphasis supplied)

As pointed out in *Nelson*, (page 9 of this brief) this is not a test of infringement of a patent with combination claims, such as the Pickrell patent. PATCO, in effect, admits that the claims in issue do not literally read upon the accused barges. Since they do not and since they are combination claims, there is no infringement. Certainly, Pacific *has* pointed out in detail where the file wrapper estoppel exists with respect to the claims sued upon.

On page 34 of the Answering Brief, the statement is made as follows:

“The mere fact that a patentee elects to cancel certain claims and continue the negotiations with the Patent Office for the procurement of other and different claims, does not bar such patentee from the right to enforce the claims obtained.”

The case of *Payne Furnace & Supply Co. v. Williams-Wallace Co.*, (C.C.A. 9 1941) 117 F.2d 823.

PATCO does not take issue with *Payne*, because in that case the rejected and cancelled claims were entirely different combinations than the claims sued upon. As stated in *Payne* at page 828, the rejected and cancelled claims included references to male and female fittings at the ends of the inner and outer tubes and do not include the feature of slidability of the inner pipe. The claims sued upon, however, which are reproduced in *Payne* at page 825, call for insulating material and an inner tube slidably located in the inside of the insulating material and do not include the male and female fittings. Obviously, as the Court stated,

“The rejected claims were for different combinations and as we understand it, any estoppel could extend no further than in the cancelled combinations.”

In the present case, however, the feature of the

single V-shaped continuous cofferdam, which is the only alleged feature of novelty by the inventor's own admission (R.T. 108) was present in the rejected and cancelled claims, although the word "V-shaped" was not used. In other words, the rejected and cancelled claims were for the same general combination as the claims in issue. As pointed out above, the claims, even though categorized as attempted by PATCO, must be read in the light of the specification, drawings, file wrapper, positions taken in Court and the prior art, and PATCO's argument falls by the wayside when all of these factors are taken into account. The case of *Bryan v. Garrett Oil Tools*, 245 F.2d 365, a Fifth Circuit case decided in 1957, cited at page 36 of the Answering Brief, is clearly distinguishable, wherein the Court found:

"* * * Moreover Bryan is not estopped from claiming broadly enough to include the Garrett valves since in pursuing his application in the Patent Office *he did not change the wording* of his claim or otherwise limit it, *but merely explained to the satisfaction of the examiner wherein the Bryan invention differed from the Otis one*—and the distinction is based on the inclusion of the *same features* that THE ACCUSED TOOLS ALSO HAVE. * * *" (Emphasis added) (245 F.2d at 369)

In *Bryan*, there was no change in the wording of the claim, but a mere explanation of the difference be-

tween the Bryan invention and the prior art in the attorney's argument in the Patent Office and the distinction was based on the *same features* that the accused tools had.

Pacific has answered either in this Brief or in the Brief on Cross-Appeal the statement made at pages 37 and 38 of the Answering Brief and the authorities cited therein.

PATCO'S ARGUMENT RE WILLFUL INFRINGEMENT

PATCO's argument re willful infringement has, for the most part, been covered in Pacific's Brief on Cross Appeal.

PATCO bases its argument on five points listed in its Answering Brief at pages 39 and 40. With respect to item (1), it is not necessary for one who is contemplating the development and construction of a barge, for example, to make a patent investigation in order to avoid a charge of willful infringement. It is apparent from the comments of all of Pacific's witnesses who are skilled in the art of designing barges that they would have considered the cofferdam obvious, would have had no difficulty in designing the same and expressed surprise that any patent could issue on such a structure. Therefore, item (1) should not be considered as a factor with respect to willful infringement.

As to item (2), the same remarks apply as to item (1).

As to item (3), this has been answered in the Brief on Appeal. Mr. Glosten would not have had time to take advantage of any information he might have obtained from Tidewater's barges or drawings.

With respect to item (4), barges on the Columbia River as shown by the prior art included single V-shaped dry cargo holds with liquid cargo space below them. Obviously, the overall designs of these large barges would not differ materially. The cofferdamming is obvious when required.

With respect to item (5), the fact that Pacific never contacted PATCO about the use of the accused barges is not an element of willful infringement. When one is sued for the infringement of a patent, he need not ask for a license, if he is of the honest opinion that the patent is invalid and there is no infringement, in order to avoid the charge of willful infringement. Such is the situation here.

With the exception of item (3) relating to Mr. Glosten's contacts re PATCO's barges, the other items are directed to what Pacific did *not* do, item (4), of course, being clearly irrelevant. As pointed out in the cases cited in the Brief on Cross-Appeal, it is necessary for PATCO to show that what Pacific *did* do was done

in bad faith, and there is not one iota of evidence with respect thereto.

It is therefore submitted that there can be no willful infringement involved, and this is particularly true since the District Court found the patent in suit to be invalid for obviousness under 35 U.S.C., Section 103.

CONCLUSION

The evidence before the District Court does not support its findings with respect to alleged infringement by Pacific or any knowing, willful and wanton character of such alleged infringement. PATCO has failed to sustain its burden of proving alleged infringement and has failed completely in establishing that there was knowing, willful and wanton infringement on the part of Pacific.

Respectfully submitted,

JOHN GORDON GEARIN

W. MELVILLE VAN SCIVER

JOHN GORDON GEARIN

By _____

CERTIFICATE OF CONFORMANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with these rules.

JOHN GORDON GEARIN
